IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY, by his parents and guardians, ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY, HaShoshan 10-A Nofei Aviv Beit Shemesh, Israel 99590,	)	
Plaintiff,	)	Civil Action No. 03CV01921(GK)
v.	)	
THE SECRETARY OF STATE, United States Department of State 2201 C Street, N.W. Washington, D.C. 20520,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Defendant, Secretary of State Colin Powell, moves this Court for an Order dismissing the Complaint for the reasons set forth in the attached Memorandum of Law in Support of Defendant's Motion to Dismiss (with exhibits).

Dated: December 22, 2003

Respectfully submitted,

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SECRETARY OF STATE COLIN POWELL

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Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff, an infant child represented in this action by his parents in their capacity as his guardians, seeks to plunge this Court into one of the more delicate foreign relations issues to have confronted this country during the last half century – the status of Jerusalem. The current and consistent foreign policy of the United States is that the competing claims to Jerusalem are open questions to be resolved pursuant to "Permanent Status Negotiations," as part of a negotiated settlement in the Middle East. Plaintiff, however, asks this Court to disregard this longstanding foreign policy position in favor of a judicial declaration that the United States must take formal action recognizing Israel as the situs of Jerusalem. Such a declaration could have serious repercussions for the foreign relations of the United States and for the prospects for a settlement of the Israeli-Palestinian conflict. Plaintiff's invocation of a

recent congressional statute on this issue does not strengthen the case for judicial involvement, but rather only underscores that this is a matter best left to the political branches. Because Plaintiff's Complaint disregards the proper role of an Article III Court in such inherently political questions and otherwise lacks legal merit, it should be dismissed.

Plaintiff is a United States citizen born October 17, 2002 in Jerusalem.[1] Consistent with United States Department of State (the "Department" or "State Department") passport policy, and the U.S. foreign policy of which it is a part, Plaintiff holds a valid U.S. passport and Consular Report of Birth Abroad ("C.R.B.A.") (the "passport documents") that identify his birthplace as Jerusalem, with no specific country designation. Plaintiff's passport documents, however, contain no restrictions; he may travel as any U.S. citizen with a valid U.S. passport could.

Notwithstanding the lack of any limitations imposed on his passport, Plaintiff asks the Court to order Defendant, the Secretary of State, to issue him new passport documents. But Plaintiff does not seek any substantive change in the rights conferred by the passport. Instead, he seeks a change in the *wording* of his passport, seeking a written recognition that his birthplace is Jerusalem, *Israel*, not simply "Jerusalem," as current U.S. passport policy provides. To support this request, Plaintiff asserts that subsection 214(d) of the Fiscal Year 2003 Foreign Relations Authorization Act, Pub. L. 107-228, mandates that the Secretary issue him a passport recognizing Israel as the country of origin of an American citizen born in Jerusalem. (Compl. at ¶ 9 (seeking declaration that Secretary "instruct personnel at United States embassies and consulates to . . . issue a passport to the plaintiff with the

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[1] Plaintiff's parents are U.S. citizens, making Plaintiff a U.S. citizen despite his birth and residence abroad. 8 U.S.C. § 1401(c).

designation of 'Jerusalem, Israel' as the place of birth.".) In effect, then, Plaintiff asks this Court to order the Secretary of State to formally recognize, for passport purposes, Jerusalem as an entirely Israeli city – an extremely sensitive foreign policy issue that has long been the source of international dispute and a matter for the careful attention of the Executive Branch.

Plaintiff's request should be denied, first, because this Court lacks Article III jurisdiction to decide this case. At the outset, Plaintiff has failed to allege facts necessary to demonstrate Article III standing. His only conceivable claim of injury arises from the Government's determination not to include "Israel" as his place of birth on his passport. But he has suffered no real, "concrete and particularized" injury necessary to confer Article III standing, and he has no legally protected interest in the particular wording of his passport. Plaintiff holds an unrestricted U.S. passport, which confers the same rights held by other holders of valid U.S. passports. Moreover, any potential claim of "stigmatic" or psychological injury based on a dissatisfaction with U.S. foreign policy – which is simply inconceivable as to an infant child – amounts to no more than a "generally available grievance about government" and is too abstract to confer standing.

Plaintiff's Complaint also presents a non-justiciable political question. Plaintiff asks the Court to inject itself into a number of sensitive political issues and overrule United States foreign policy, undercutting decades of Executive Branch involvement in the Middle East peace process, including the recent Roadmap for Peace in the Middle East created by the United States, with the cooperation of the European Union, United Nations, and Russian Federation (collectively, the "Quartet"). Longstanding United States foreign policy is that the final status of Jerusalem should be determined through Permanent Status Negotiations, as part of a negotiated settlement in the Middle East. United States

passport policy regarding U.S. citizens born in Jerusalem is inextricably intertwined with this broader United States foreign policy as determined by the President, and this Court should refrain from interposing its views in an area that is constitutionally committed to the Executive Branch.

Plaintiff's claim also fails on the merits. In signing the Act containing the statutory provision on which Plaintiff relies, the President read Section 214(d) as precatory, not mandatory. The President's construction of the statute, given the textual constitutional commitment to the President of the duty to faithfully execute the laws and to conduct the Nation's foreign affairs – which includes the communications with foreign governments known as "passports" – is entitled to substantial deference by this Court. Such a reading is consistent with the plain text of the statute as a whole; indeed, a related provision in the same section simply "urges" the President to change particular aspects of U.S. foreign policy with respect to Israel.

Most importantly, an advisory, rather than mandatory, reading of the statutory provisions at issue is dictated by the doctrine of constitutional avoidance. If read to mandate compliance by the Executive Branch, as Plaintiff asserts, Section 214(d) would place an unconstitutional burden on the President's role as the principal organ of U.S. foreign policy. The President, recognizing these constitutional concerns, issued on September 30, 2002 upon signing the legislation a statement (Presidential "Signing Statement") that the entirety of Section 214 (including provisions not challenged in this case) "concerning Jerusalem . . . would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." To construe Section 214(d) as mandatory would be to hold that

Congress has legislated a change to the Executive Branch's decades-long foreign policy with respect to Jerusalem and would impermissibly burden the President's foreign affairs powers. To avoid this result, this Court should defer to the Executive's interpretation of Section 214(d) as simply indicating Congress's preference that the President take the actions at issue. Were this Court to hold it necessary to reach this constitutional question, it should invalidate the provision at issue. In either event, Plaintiff's claims fail on the merits.

II. BACKGROUND

A. The 2003 Foreign Relations Authorization Act

The statutory provision that Plaintiff relies upon is found in the lengthy Foreign Relations Authorization Act, Fiscal Year 2003 (the "Act"). See H.R. 1646, Pub. L. 107-228, 116 Stat. 1350. The Act authorizes billions of dollars in appropriations for the Department of State and implementation of federal statutes such as the Arms Export Control Act, 22 U.S.C. §§ 2751-2756, and the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2151i.

Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The specific subsection that Plaintiff relies on is 214(d), which provides:

> Record of Place of Birth as Israel for Passport Purposes – For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

The remainder of this section "urges the President . . . to immediately begin the process of relocating the

United States Embassy in Israel to Jerusalem," § 214(a)[2], purports to limit funding for a U.S. consulate in Jerusalem unless the facility is supervised by the U.S. Ambassador to Israel, § 214(b)[3], and purports to limit funding under the Act for publishing any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel," § 214(c).[4]

B. The President's September 30, 2002 Signing Statement

The President signed the Act on September 30, 2002. But because of Section 214 regarding Jerusalem, and certain other troubling provisions, consistent with Executive practice the President issued a Signing Statement setting forth his construction of Section 214. See 38 Weekly Compilation of Presidential Documents 1658-60 (September 30, 2002) (attached as Ex. A.). After recognizing the Act's "[m]any provisions . . . [that] will strengthen our ability to advance American interests around the

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[2] In 1995, Congress passed the Jerusalem Embassy Act, Pub. L. 104-45 , which purports to limit the obligation of other overseas building expenses until the U.S. Embassy in Jerusalem is officially opened. But, consistent with the President's ultimate responsibility for and control over foreign policy, Section 7 of the Act gives the President the ability to suspend the limitation by certifying U.S. national security interests. The President has repeatedly invoked this waiver since enactment, most recently in December 2003.

[3] At present, the U.S. Consulate General in Jerusalem, established in 1928, is an independent U.S. mission whose members are not accredited to a foreign government. They do not report to the U.S. Ambassador to Israel.

[4] On February 20, 2003, the President signed the "Consolidated Appropriations Resolution, 2003," Pub. L. 108-7. Division B, Title IV, Section 404 provides: "For the purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon request of the citizen, record the place of birth as Israel." Upon signing the bill, the President issued a statement that certain provisions were "inconsistent with the constitutional authority of the President to conduct foreign affairs . . . [and so the Executive Branch would thus] construe [those sections] as advisory." See Weekly Comp. of Presidential Documents, Vol. 39, No. 8 at 225-27. Plaintiff's Complaint does not mention Section 404, but the language is nearly identical to Section 214(d) of the Act, and for the reasons outlined in this Memorandum of Law, Section 404 also is unconstitutional if construed as mandatory.

globe, including nonproliferation of weapons of mass destruction, and to meet our international commitments," the President discussed the "number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern." (Ex. A at 1658.)

The President stated:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

(Id. at 1659.)

The President concluded his statement with:

> My approval of the Act does not constitute my adoption of the various statements of policy in the Act as U.S. foreign policy. Given the Constitution's commitment to the presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory, giving them the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.

(Id. at 1660.)

C. United States Policy Regarding Jerusalem

For more than half a century, the United States has played an important mediating role in promoting a negotiated settlement to the Middle East Arab-Israeli conflict. The city of Jerusalem – recognized worldwide as having significant historic, religious, spiritual and cultural meaning for Judaism, Christianity, and Islam – lies at the heart of this conflict. As a result, United States policy, consistent with many other countries, is that Jerusalem's final status has not yet been determined but will be settled by Permanent Status Negotiations between the parties to the Middle East conflict. Israel and the Palestinians likewise have agreed that the question of Jerusalem is a matter to be addressed in Permanent Status Negotiations. The United States consistently follows this policy, which is consonant with U.N. Security Council resolutions and agreements between the parties concerning the Middle East conflict. The practice of identifying only Jerusalem on passport documents for U.S. citizens born there stems from this policy.

1. U.N. Security Council Resolutions and Agreements Between the Parties Regarding Permanent Status Issues, Including Jerusalem

Prior to 1967, Israel and Jordan each controlled parts of Jerusalem. In June 1967, as a result of the Six-Day War, Israel acquired control of the former Jordanian-controlled parts of the city. On November 22, 1967, the United Nations Security Council adopted Resolution 242, and on October 22, 1973, the Security Council adopted Resolution 338. Together, these resolutions established a framework for negotiations to reach a just and durable peace in the Middle East. U.N. Security Council Resolutions 242 and 338 remain as a foundation for efforts to negotiate a settlement to the Israeli-Palestinian conflict. (See Exs. B, C.)

On September 13, 1993, the Declaration of Principles on Interim Self-Government Arrangements (the "Declaration") was signed between Israel and the Palestinian Liberation Organization ("P.L.O.") and witnessed by the United States and the Russian Federation. The Declaration created two time frames: a transitional period, and "Permanent Status Negotiations." The "issue" of Jerusalem was determined to be a part of the Permanent Status Negotiations. The Interim Agreement (the "Agreement") on the West Bank and Gaza Strip was signed by Israel and the P.L.O. on September 28, 1995. The Agreement confirmed that, "[i]n accordance with the [Declaration of Principles] . . . issues that will be negotiated in the permanent status negotiations [include] Jerusalem."

2. The Roadmap For Peace

President Bush, in a June 24, 2002 speech, outlined the United States vision for a settlement of the conflict consistent with U.N. Resolutions 242 and 338. The President called for a new Palestinian leadership and voiced support, under certain conditions, for the "creation of a Palestinian state whose borders and certain aspects of its sovereignty will be provisional until resolved as part of a final settlement in the Middle East." (See Ex. D.)

The Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict was then created by the United States and other members of the Quartet to implement this vision. Presented to Israel and the Palestinian Authority on April 30, 2003, the Roadmap contains three clear phases and time lines with a goal of achieving "a final and comprehensive settlement of the Israel-Palestinian conflict by 2005." (See Ex. E.) In Phase III, scheduled for 2004-2005, a Permanent Status Agreement is sought, "leading to a final, permanent status resolution in 2005 [of, among other things,] Jerusalem." (Id. at p. 4.)

Defendant, Secretary of State Colin Powell, delivered a speech on September 29, 2003 that confirmed the United States's commitment to the President's vision, as outlined on June 24, 2002, and the Quartet's determination that the Roadmap for Peace is the best way to achieve that vision and peace in the Middle East. (See Ex. F.) Pursuant to the Roadmap, the status of Jerusalem will be addressed in Phase III, during Permanent Status Negotiations.

D. United States Policy For Issuing Passports To U.S. Citizens Born In Jerusalem

The Department of State has adopted special instructions for its consular officers overseas to govern passport documents for U.S. citizens born in the Jerusalem city limits. These instructions, necessary to implement U.S. foreign policy toward the Middle East, are found, along with other instructions pertaining to the preparation of and issuance of passports for persons born abroad, in the Foreign Affairs Manual. (See pertinent sections of Vol. 7, Foreign Affairs Manual ("FAM"), Ex. G.)

The general policy for U.S. citizens born abroad is to print on passport documents the country of birth.[5] (See Ex. G at 7 FAM 1383.) There are exceptions to this general policy, however, as when "there is a question as to what country has present sovereignty over the actual area of birth," (Ex. G at 7 FAM 1383.4), or where a person is born in a country "not recognized by the U.S.," (Id. at 7 FAM 1383.5-1).

There is an exception specifically applicable to Jerusalem, which reflects longstanding U.S. policy in a sensitive foreign affairs matter concerning the appropriate recognition given to a foreign state.

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[5] Issuance of the C.R.B.A. is covered in a separate part of the FAM; the city and country of birth are generally listed on the certificate, but the same exception for Jerusalem applicable to passports applies to the C.R.B.A.

This exception provides that the birthplace on a passport document for an applicant born before May 14, 1948 in an area that was within the municipal borders of Jerusalem be identified as "Jerusalem." (Id. at 7 FAM 1383.5-6.) Passport documents of persons born before May 14, 1948 in a location outside Jerusalem's municipal limits and later was annexed by the city are to be identified as either "Palestine" or the name of the location (area/city) as known before annexation. (Id.) For persons born after May 14, 1948 outside Jerusalem's municipal limits in an area later annexed by the city, it is acceptable to enter the name of the location (area/city) as known before annexation. (Id.). For all other persons, Jerusalem is shown as the place of birth. Part II of the instructions lists the precise names of countries and territories to be used in U.S. passport documents. Next to "JERUSALEM" it reads "[Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.]." (Id. at 7 FAM 1383 Exhibit 1383.1, Part II.) These provisions, together, set forth the United States policy to not identify Israel, Jordan or any other country as the birthplace for U.S. citizens born there.

III. ARGUMENT

A. Plaintiff Lacks Standing.

This Court lacks Article III jurisdiction over this case because Plaintiff has failed to allege facts sufficient to demonstrate standing. To establish the "irreducible constitutional minimum of standing" a plaintiff must allege and prove, among other things, an "'injury-in-fact,' – an invasion of a legally protected interest which is (a) concrete and particularized, [citations omitted] and (b) 'actual or imminent, not not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations omitted); see also Alamo v. Clay, 137 F.3d 1366, 1369 (D.C. Cir. 1998); National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). A "generally

available grievance about government" is insufficient. Lujan, 504 U.S. at 573-74. By limiting the judicial power to instances where specific individuals have suffered concrete injuries, standing requirements enforce "the idea of separation of powers on which the Federal Government is founded." Allen v. Wright, 468 U.S. 737, 750 (1984); see also Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing is "founded on concern about the proper – and properly limited – role of the courts in a democratic society.")

Plaintiff, an infant child acting through his parents, has failed to allege any sort of injury, let alone a judicially cognizable one. His Complaint is bereft of any facts that would allow this Court to conclude that he has suffered an invasion of any "concrete and particularized" legal interest. Lujan, 504 U.S. at 561. At best, the Complaint can be read to assert that Plaintiff is injured solely as a result of the Government's denomination of "Jerusalem," rather than "Jerusalem, Israel," as his place of birth on his passport. But Plaintiff has no legally protected interest in the particular wording of his passport. The content of a passport, and whether it lists the place of birth of its holder at all, rests with the Executive Branch. Thus, irrespective of the Department's response to his parents' request, Plaintiff still holds a valid U.S. passport with no restrictions;[6] his rights to use it for all purposes allowed by law are the same as those of other holders of valid U.S. passports. Were Plaintiff to receive the passport his parents request – the sole change being to add the word "Israel" – these rights would not be enlarged in any way.

Plaintiff's claim is in reality an objection to the Executive Branch's foreign policy toward the

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[6] 8 U.S.C. § 1101(a)(30) defines "passport" as a travel document issued by competent authority showing the bearer's origin, identity, and nationality, if any, which is valid for admission of the bearer into a foreign country. Plaintiff's passport meets this definition.

Middle East, as evidenced by the unwillingness to issue passports inconsistent with the longstanding policy toward Permanent Status Negotiations. Such a general, non-individuated assertion of harm wholly fails to satisfy Article III's rigid requirements. Id. at 573-74. As the Supreme Court has held, the "'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.'" Id. at 575-76 (quoting Allen, 468 U.S. at 754; Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982)).

Nor may Plaintiff, acting through his parents, assert a "stigmatic" or psychological injury in order to support standing. Indeed, the very notion that an infant child suffers some sort of psychological injury sufficient to give rise to an Article III controversy solely as a result of the contents of his passport is nothing short of absurd. In any event, regardless of Plaintiff's age, any psychic dissatisfaction with U.S. foreign policy towards Jerusalem amounts to no more than a "generally available grievance about government" and is too abstract to confer standing. Lujan, 504 U.S. at 573-74; see also Allen, 468 U.S. at 755 ("abstract stigmatic injury" cannot confer Article III standing); Alamo, 137 F.3d at 1370 (D.C. Cir. 1998) ("Purely speculative or conclusory assertions of the consequences of [an] alleged stigma do not satisfy the Supreme Court's requirement for specific, concrete facts demonstrating a particularized injury.") (citing Block v. Meese, 793 F.2d 1303, 1308 (D.C. Cir. 1986); Warth, 422 U.S. at 508).

This is true even where Plaintiff seeks to rely on a statutory provision, Section 214(d), as the source of the "right" his parents seek to enforce in this Court. As the Supreme Court discussed in Lujan:

> The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed, Art. II, § 3.

504 U.S. at 576-77. The federal constitutional standards for determining whether standing exists – not Section 214(d) – control, and those standards require an actual, cognizable, and concrete injury. Id. at 561; see also Hydro Investors, Inc. v. Federal Energy Regulatory Comm'n, 2003 WL 22948531 (D.C. Cir. December 16, 2003) ("Administrative agencies need not adjudicate only Article III cases and controversies, but federal courts must. If the petitioner has no Article III concrete interest in receiving the relief requested before the agency, this Court has held, Congress has no power to grant a petitioner a right to seek judicial review of an agency's decision to deny him relief.") (citations omitted). Plaintiff's (or more to the point, his parents') purely psychological displeasure with U.S. foreign policy is not such an injury. A dismissal for lack of standing is appropriate.

B. Plaintiff's Claim Presents A Non-justiciable Political Question.

Plaintiff's claim would require this Court to make determinations that are committed to the Executive Branch. As such, adjudication of the claim is barred by the political question doctrine. See, e.g., People's Mojahedin Org. of Iran v. United States Department of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding it "beyond the judicial function for a court to review foreign policy decisions of the

Executive Branch" as it relates to national security of United States) (citing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)), cert. denied, 529 U.S. 1104 (2000); see also Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 201 (3rd Cir. 1986) (affirming dismissal as non-justiciable a challenge to President's decision to extend diplomatic relations to the Vatican because "President's resolution of such questions constitutes a judicially unreviewable political decision"), cert. denied, 479 U.S. 914 (1986), pet'n for rehearing denied, 479 U.S. 1012 (1986). That doctrine, the roots of which go back as far as Marbury v. Madison, 1 Cranch (5 U.S.) 137, 165-66 (1803), counsels courts to abstain from passing on questions more properly reserved to the political branches of government.

The Supreme Court has set forth the following formulation for determining whether an issue constitutes a political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

American diplomatic and foreign affairs – of which foreign state recognition is at the center –

are invariably deemed to be political questions because the Supreme Court has often found a "textually demonstrable constitutional commitment" of United States diplomacy and foreign policy to the political branches. Baker, 369 U.S. at 217; see, e.g., Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters related to foreign policy and national security are rarely proper subjects for judicial intervention."); Chicago & Southern Air Lines, 333 U.S. at 111 ("the very nature of executive decisions as to foreign policy is political, not judicial"); United States v. Pink, 315 U.S. 203, 229 (1942) ("'What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. . . . Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not the courts.") (citations omitted); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (discussing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress"); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); see also Worthy v. Herter, 270 F.2d 905, 911 (D.C. Cir. 1959) ("It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs.")[7] (citation omitted); United States ex rel.

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[7] Worthy was used by the D.C. Circuit to dispose of a similar case, Frank v. Herter, 269 F.2d 245 (D.C. Cir. 1959), in a few sentences. See 269 F.2d at 246. But Chief Justice (then Circuit Judge) Warren Burger added a substantive concurring opinion in Frank expanding on the political question issue as related to foreign affairs, which is worth noting:

(continued...)

Keefe v. Dulles, 22 F.2d 390, 394 (D.C. Cir. 1954) (refusing to order Executive to take steps to free serviceman held by French civilian jailer – "the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or discretion in such matters.") (citations omitted), cert. denied, 348 U.S. 952 (1955).

The Third Circuit's decision in Americans United for Separation of Church and State v. Reagan is instructive. 786 F.2d 194. A group of twenty religious organizations, twelve religious officials, and seventy-one members of the clergy filed suit challenging United States diplomatic relations with the Vatican. The district court dismissed the Complaint for lack of standing and because it presented a non-justiciable political question. 786 F. 2d at 198. The Third Circuit, discussing the justiciability

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[7](...continued)

> In the implementation of our foreign policy and especially in relation to Communist China, the State Department recently concluded that a limited number, approximately 40, news representatives would be permitted to go to the Chinese mainland, on an experimental and temporary basis, provided the forces in control of that area would receive them. This threshold decision is political in the highest sense and is not reviewable on any basis in any circumstance by any court. Obviously, judges have neither the information essential to evaluate such a decision nor the competence and experience to appraise the information even if by chance it should be made available to them. Courts have no more occasion or power to inquire into such decisions than the State Department would have to inquire into the time allotted for oral argument or the length of printed briefs on appeals in this court.

269 F.2d at 247 (Burger, J., concurring).

issue, found two issues presented: "(1) Is the Vatican a territorial sovereignty sufficiently independent of other such sovereign entities as to be entitled to recognition?, and (2) Is the regime claiming to be its government entitled to recognition as such?" 786 F. 2d at 201.

The court refused to address either issue, holding that "[i]t has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision." Id. (citations omitted). Discussing the Baker factors, the Third Circuit held:

> There is such a textually demonstrable commitment with respect to recognition of foreign states. Only the President has the power to 'receive Ambassadors and other public Ministers.' U.S. Const., art. II, § 3. Only the President has the power to appoint ambassadors, other public ministers, and consuls, although those appointments require the advice and consent of the Senate. Id., art. II, § 2, cl. 2.
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> * * *
>
> *Legal challenges to the establishment of diplomatic relations require the review of one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch.* Thus, even assuming that some plaintiff could satisfy the standing required to go forward with this action, a federal court could not grant the plaintiffs the relief they seek.

Id. at 202 (emphasis added).

Plaintiff seeks to raise issues of territorial sovereignty and state recognition similar to those facing the Third Circuit in Americans United, but even more pronounced and politically sensitive. Adjudicating Plaintiff's claim seeking to order the Secretary of State to recognize Jerusalem as an entirely Israeli city would thrust this Court into ongoing political and foreign policy efforts directed

toward the highly sensitive Middle East conflict. The Court would be required to second-guess the Executive's policy regarding the recognition of Jerusalem, made pursuant to an express and exclusive "textually demonstrable constitutional commitment." Baker, 369 U.S. at 217. In so doing, the Court also would have to undermine the President's (and prior Presidents') diplomatic efforts and decision-making over several decades as to the Middle East conflict, by necessity "expressing lack of the respect due coordinate branches of government." Id. The same problems arise in considering the effect of changing the passport policy on ongoing diplomatic efforts. Any ultimate decision to set aside U.S. foreign policy with respect to Jerusalem would directly undercut the Quartet's Roadmap for Peace in the Middle East. Such a decision would be "impossib[le] . . . without an initial policy determination of a kind clearly for nonjudicial discretion." Id.

The status of Jerusalem also presents one of those circumstances where there is "an unusual need for unquestioning adherence to a political decision already made." Id. That decision by the Executive Branch, taking into account the longstanding policy of the United States, U.N. Security Council resolutions, and the agreements between the parties to the conflict, and confirmed recently in the Roadmap for Peace, is that the status of Jerusalem is to be determined through Permanent Status Negotiations. The President and Secretary of State are actively fulfilling the Executive Branch's constitutional role through their involvement in the Middle East peace process. Were the Court to undermine that role and restate U.S. foreign policy to Plaintiff's liking, the "potentiality of embarrassment from multifarious pronouncements by various departments" on the status of Jerusalem would be a certainty. Id.

Indeed, Baker itself specifically cited the recognition of foreign governments as a quintessential

political question. As the Supreme Court explained, the "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing,' and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory recognition." Id. at 212.

The Court should not usurp the Executive's efforts to address the Middle East conflict through the political process.[8] To do so would be to overrule the President's carefully balanced and historically grounded judgment regarding U.S. passport documents for U.S. citizens born in Jerusalem. These types of judgments are:

> political judgments, 'decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'

People's Mojahedin, 182 F.3d at 23 (quoting Chicago & Southern Air Lines, 333 U.S. at 111). The Court should dismiss Plaintiff's claim as a non-justiciable political question.

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[8] That Congress has attempted to legislate in this area does not change the analysis, for even if the political branches could be said to disagree over the importance of handling Jerusalem through the Permanent Status Negotiations, they do not appear to disagree over the President's constitutional authority in the area of foreign affairs. Indeed, in Section 214(a) of the Act, "Congressional Statement of Policy," Congress does not demand but merely "*urges* the President . . . to begin the process of relocating the United States Embassy in Israel to Jerusalem," in recognition of his authority over foreign affairs. (Emphasis added); see also note 2, supra. This Congressional recognition of Executive authority over foreign affairs, and specifically, passport policy, was discussed at length by the Supreme Court in Agee, where the Court wrote: "[f]rom the outset, Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." 453 U.S. at 293-94 (citations omitted).

C. The President Properly Interpreted Section 214(d) As Advisory in Nature

Because Plaintiff's case raises a classic political question, and Plaintiff lacks standing, the Court should dismiss this action as non-justiciable. But if the Court were to reach the merits, Plaintiff's case fails because, read in light of relevant canons of construction, Section 214(d) represents Congress's non-binding request to the President regarding the conduct of foreign relations as it relates to passports issued to individuals born in Jerusalem. The President's interpretation of this provision as precatory is supported by several familiar canons of statutory construction. First, given the President's broad constitutional authority in this realm of foreign affairs, his interpretation of a congressional enactment relating to the recognition of foreign states and the issuance of passports is entitled to substantial deference by this Court. Moreover, because Section 214(d) is part of a provision relating to U.S. foreign policy respecting Israel, it must be read in that broader context, and one related subsection of the provision supports the reading of Section 214(d) as advisory. Finally, if read as a mandate to the Secretary to revise Plaintiff's passport documents upon his parents' request, the statute would unconstitutionally burden the President's authority over the Nation's foreign affairs. Thus, the familiar doctrine of constitutional avoidance supports the President's alternative reading of the provision at issue.

1. The Constitutional Bases for Executive Branch Authority Over Foreign Affairs

Section 214(d) represents an attempt by Congress to legislate in a core area of foreign affairs constitutionally committed to the President. The President is vested with exclusive authority over the Nation's foreign affairs, a power that derives in large part from his authority as Executive and Commander in Chief. See American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2386 (2003) ("the

historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations'") (citation omitted). Other, specific constitutional provisions provide further guidance on the President's authority. Article II, Section II, Clause 2, provides the President with plenary authority over the conduct of treaty negotiations and the terms of treaties. Similarly, he has the constitutional authority to appoint Ambassadors. Id. Relying on these express authorities, the Supreme Court has long recognized the "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." Curtiss-Wright Corp., 299 U.S. at 319-20; see also Americans United for Separation of Church and State, 786 F.2d at 202 ("There is such a textually demonstrable commitment with respect to recognition of foreign states. Only the President has the power to 'receive Ambassadors and other public Ministers' . . . [and] to appoint ambassadors, other public ministers, and consuls [with] the advice and consent of the Senate.") (citations omitted).

This dispute touches directly on one of the President's core, express Executive functions. Article II, Section 3 gives the President the power to "receive Ambassadors and other public Ministers." At the heart of this authority is the power to recognize foreign governments.[9] Keefe, 22 F.2d 390 at 394 ("commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State"). The issuance and regulation of U.S. passport documents fall squarely within this authority, and longstanding Congressional enactments

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[9] As discussed earlier, Baker specifically acknowledges that the "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.'" Baker, 369 U.S. at 212.

reflect this understanding. In 22 U.S.C. § 211a, Congress recognizes the broad discretion of the Executive, acting through the Secretary of State, to issue passports. 22 U.S.C. § 211a (recognizing authority of Secretary of State to grant, issue and verify passports and expressly noting that, except as authorized by the Secretary, "*no other person shall grant, issue, or verify such passports*") (emphasis added). Similarly, 22 U.S.C. § 2656, directs the Secretary to perform the duties entrusted to him by the President related to foreign affairs.[10] See Agee, 453 U.S. at 293-294 (1981); Zemel, 318 U.S. at 8 n.5. The D.C. Circuit has noted the reason for the constitutional commitment of authority to the President in this particular area. In upholding the State Department's denial of a passport to a media member who failed to agree to then-existing restrictions[11] on U.S. travel abroad, the Court wrote: "Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even 'public opinion.' He makes his decision with the aid of the Department of State, a large organization with stations throughout the world, as well as on the basis of information received from all other parts of the Executive branch." Worthy, 270 F.2d at 913.

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[10] In addition, Executive Order No. 11295, 3 C.F.R. 570 (1966-1970 Comp.) empowers the Secretary to use 22 U.S.C. § 211a to prescribe rules governing U.S. passport issuance, and such rules exist at 22 C.F.R. Part 51. (And, the Foreign Affairs Manual and Passport Instruction discussed above provide guidance to be used in implementing the regulations.)

[11] The Government's use of travel restrictions is somewhat different today than when Worthy and Frank (see note 8, supra) were decided. But the general principles the court discussed regarding Executive authority over foreign affairs, and especially U.S. passport policy, are unaffected by any changes in U.S. policy regarding travel restrictions.

2. Viewed in the Proper Context, Section 214(d) is Permissive, not Mandatory.

In light of these constitutional principles and historical understandings, the language in Section 214(d) cannot be read to confer the absolute right that Plaintiff asserts. When signing the Act, the President noted the grave constitutional difficulties that would flow from such a mandatory reading of the statute. If construed as mandatory, the President concluded, Section 214 "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch . . . and determine the terms on which recognition is given to foreign states." (See Ex. A at 1659.) Consequently, in signing the Act, the President construed the statute as permissive, merely advising the President of Congress's position regarding his conduct of foreign affairs.

Given the nature of this legislation – directly affecting, as it does, the conduct of U.S. foreign policy and, more specifically, passport policy – the President, as the sole organ of U.S. foreign policy, is entitled to substantial deference in his interpretation of Section 214(d). See, e.g., Regan v. Wald, 468 U.S. 222, 243 (1984) (noting "the traditional deference to executive judgment '[i]n this vast external realm'" of foreign affairs) (citations omitted); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (regarding the meaning attributed to treaty between United States and Japan, "the meaning attributed . . . by the Government . . . is entitled to great weight") (citation omitted). The reasonableness of the President's interpretation in this case is supported by the statutory context in which the provision arises and by several canons of statutory interpretation.

First, while Section 214(d) states that the Secretary "shall" revise passports upon request, that provision is not, as Plaintiff suggests, necessarily a mandatory term. See Gutierrez de Martinez v.

Lamagno, 515 U.S. 417, 434 (1995) (despite use of "shall" twice in statute purporting to deem the United States as the party defendant upon certification by the Attorney General, Court refused to read statute as mandatory based on "traditional understandings and basic principles"). Instead, "the context of a particular usage may at times require the construction of 'may' as mandatory or 'shall' as permissive." Lo Shippers Action Comm. v. Intertate Commerce Comm'n, 857 F.2d 802, 806 (D.C. Cir. 1988); United Hosp. Ctr., Inc. v. Richardson, 757 F.2d 1445, 1453 (4th Cir. 1985) (based on the "context of the statute" . . . in a proper case 'shall' may properly be construed as permissive, . . . and 'may' as mandatory") (citations omitted).

Here, the statutory context supports the President's permissive reading of Section 214(d). Indeed, in spelling out the applicable "Congressional Statement of Policy" related to the Jerusalem provisions, Section 214(a) of the same statute recognizes Executive authority over foreign affairs by not demanding but merely "*urg[ing]* the President . . . to begin the process of relocating the United States Embassy in Israel to Jerusalem." (Emphasis added.) This does not support a reading of Section 214(d) as an absolute foreign policy change, as Plaintiff suggests. This reading is consistent with decades of Congressional practice recognizing the President's authority over foreign affairs and passport issuance through a number of statutory provisions, most notably, 22 U.S.C. § 211a, which confirms the Secretary's broad authority with respect to passport policy.[12] The Supreme Court

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[12] Importantly, this provision is not mentioned in Section 214. Nor are any other statutory provisions related to U.S. passports mentioned in Section 214. These include the Passport Act, 22 U.S.C. §§ 211a-214a; the statute that deems a passport and C.R.B.A. proof of U.S. citizenship, 22 U.S.C. § 2705; the statute providing the Secretary's authority to conduct the Nation's foreign relations as directed by the President, 22 U.S.C. § 2656; and the Immigration and Nationality Act, 8 U.S.C. §§ (continued...)

discussed at length this congressional recognition of Executive authority over passport policy in upholding the Secretary's revocation of a passport on national security and foreign policy grounds. See Agee, 453 U.S. at 293-94 ("The history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy. . . . From the outset, Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports.").

Any contrary construction of Section 214 would effect an implied partial repeal of 22 U.S.C. § 211a, by limiting the Secretary's wide discretion of U.S. passport policy as it relates to Jerusalem. Implied repeals are disfavored. Federal Trade Comm'n v. Ken Roberts Co., 276 F.3d 583, 592 (D.C. Cir. 2001) ("Both the Supreme Court and this court have observed that implied repeals of one statute (or a provision in one statute) by another are 'not favored.'") (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (quoting United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976)); Galliano v. United States Postal Serv., 836 F.2d 1362, 1369 (D.C. Cir. 1988) ("strongly disfavored")). Rather, related statutes should be harmonized where possible. See Louisiana Pub. Serv. Comm'n v. Federal Comm. Comm'n, 476 U.S. 355, 370 (1986) ("we are guided by the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict"). The President's construction of Section 214(d) as permissive properly harmonizes the provision with pre-existing federal enactments regarding U.S. passport policy and practice.

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[12](...continued)
1101-1105.

Finally, the President's permissive reading of the statute is, as he indicated upon signing, necessary to save the statute from unconstitutionality or, at a minimum, to avoid a serious constitutional question. (See Ex. A at 1659.)[13] As the Supreme Court has repeatedly noted, "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it a cardinal principle that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989) (citations omitted); see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress") (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979)); Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). Courts should "not lightly assume that Congress intended to . . . usurp power constitutionally forbidden it." DeBartolo Corp., 485 U.S. at 575 (citing Grenada County Supervisors v. Brogden, 112 U.S. 261, 269 (1884). As the discussion below indicates, Section

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[13] The Presidential Signing Statement has long been used by Presidents to interpret statutes that, otherwise construed, might raise significant constitutional problems. See, e.g., Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance, Pub. Papers of John F. Kennedy 6 (Jan. 9, 1963) (President stated that he would treat unconstitutional legislative veto of bill he was signing as a "request for information"). The D.C. Circuit has recognized this practice of using a Presidential Signing Statement to adopt a "saving construction" of a statute, explaining that the President will construe certain provisions in a manner to avoid constitutional infirmities. See Federal Election Comm'n v. NRA Political Victory Fund, 1993 U.S. App. LEXIS 27298, *11-12 (D.C. Cir. 1993) (citing two Presidential Signing Statements adopting saving constructions of legislation limiting appointment power) (Silberman, J., joined by Wald, J.).

214(d) cannot be read as mandatory, as suggested by the plaintiff, without raising fatal or serious constitutional concerns. This Court should avoid these concerns by approving the permissive statutory interpretation adopted by the President.

3. A Mandatory Reading of Section 214(d) Would Impermissibly Encroach on the President's Constitutional Authority Over Foreign Affairs.

If Section 214(d) is read as a command to comply with a Jerusalem-born U.S. citizen's request to designate his birthplace as Israel, then it unconstitutionally directs the Executive in his conduct of U.S. foreign policy, including his power to recognize foreign states and the broader power to speak for the United States in foreign affairs. That policy currently is that the final status of Jerusalem is to be resolved in Permanent Status Negotiations between the parties. A recognition of Jerusalem as a definitive part of Israel for purpose of passport processing would be inconsistent with that policy; thus, forcing the Executive Branch to revise its passport policy would substantially interfere with foreign policy matters firmly committed to the President.

This underlying policy is currently implemented by identifying only Jerusalem (without attributing Jerusalem to any particular state) on the passports of U.S. citizens born there. More than simply a form of individual identification needed for travel abroad, passports are, in fact, communications between governments.[14] Agee, 453 U.S. at 306 (passport is a "letter of introduction" issued by the sovereign).

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[14] The passports that the United States issues to its citizens allow the citizen to present to the foreign government the following communication of the United States Government, which appears in the passports of all U.S. citizens: "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection."

As noted above, the President is the "sole organ of the federal government" responsible for these communications. Curtis-Wright, 299 U.S. at 319-20. To read the statute as mandatory would be to order the President to communicate with foreign countries a certain way regarding the U.S. policy on Jerusalem. Such a Congressional mandate would be a substantial intrusion upon the President's "power to speak . . . as a representative of the nation." Id at 319. Consequently, should this Court read Section 214(d) as mandatory, it must be stricken as unconstitutional for the many reasons discussed above. The power over United States foreign affairs and, specifically, state recognition and U.S. passport policy, is vested solely in the Executive Branch, and Congress may not legislatively alter U.S. foreign policies and procedures in these areas. Section 214(d), read as Plaintiff suggests, represents a substantial intrusion into the President's conduct of U.S. foreign policy with respect to a question that has commanded the attention of Presidents for more than half a century. The President cannot, on the one hand, be required to communicate by his Secretary of State to foreign governments that the United States recognizes Jerusalem as part of Israel (as Plaintiff's request for judicial relief ordering amendment of his passport would require), while at the same time adhering to his consistent foreign policy position that the status of Jerusalem must be resolved in negotiations between Israel and the Palestinians. Such a reading would frustrate the Constitution's design that the Government speak with one voice in the conduct of foreign affairs. See Garamendi, 123 S. Ct. at 2386 (noting the Constitution's "concern for uniformity in this country's dealings with foreign nations"). And given the sensitivity of the particular subject matter, Congress's frustration of the President's foreign policy here could have dramatic repercussions, not simply with respect to this country's relations with Israel and the Palestinians and

their peace negotiations, but with respect to its relationships with other countries. This Court should not countenance such a substantial interference with delicate foreign policy objectives outlined by the President and reflected in the Roadmap for Peace. It can and should read the statute to avoid this serious constitutional difficulty. But if it cannot do so, Section 214(d) must be invalidated as impermissibly infringing the President's plenary constitutional authority over the conduct of foreign affairs.[15]

4. Mandamus is not Available to Order the Secretary to Issue Plaintiff New Passport Documents That Identify Israel as Plaintiff's Birthplace.

Finally, Plaintiff's Complaint fails to state a claim for relief because there is no legal remedy to afford Plaintiff the relief he seeks. Plaintiff does not, and could not, contend that Congress made Section 214(d) judicially enforceable through a private right of action. Instead, Plaintiff seeks mandamus under 28 U.S.C. § 1361, (Compl. at ¶ 1), which will issue "only where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931) (citations omitted).

The D.C. Circuit has rejected mandamus to order the Secretary of State to issue a passport,

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[15] Because Section 214 operates independently of the remainder of the Act, it is severable; should the Court strike it, the rest of the Act remains law. Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."). As to the similar appropriations Section 404 in Pub. L. 108-7, there is an express severability clause in Section 604. The Supreme Court has given such clauses effect to excise objectionable provisions while leaving statutes in place. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987).

viewing the drastic remedy as one reserved for the clearest, most compelling, and exigent circumstances. Cartier v. Secretary of State, 506 F.2d 191, 199-200 n.8 (D.C. Cir. 1974), cert. denied, 421 U.S. 947 (1974). "Courts have no general supervisory powers over the executive branches or over their officers, which may be invoked by writ of mandamus. Interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief." Id. at 200 n.8 (citations omitted). Only where there is clear "illegality of action" may courts intervene with a mandamus. Id.

Plaintiff's request for mandamus fails to meet these requirements. Pursuant to United States passport policy and procedure, Defendant promptly issued Plaintiff a C.R.B.A. and U.S. passport that identify Jerusalem as Plaintiff's place of birth.[16] (See Compl., Exs. 1, 2.) These are valid U.S. documents with no restrictions. That Plaintiff's parents desire them also to identify Israel – inconsistent with United States foreign policy – does not create sufficiently compelling and exigent circumstances to justify mandamus.

Nor is there any "clear and indisputable" legal duty warranting mandamus. As discussed above, construing Section 214(d) to be mandatory would raise grave constitutional concerns. The Secretary's action to not identify Israel on Plaintiff's passport documents is consistent with U.S. policy on the status of Jerusalem and the resulting necessary U.S. procedures for issuing passport documents to individuals born in Jerusalem. The provision that Plaintiff relies upon is wholly inconsistent with these policies and

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[16] On December 24, 2002, Plaintiff's mother applied to register Plaintiff's birth and status as a U.S. citizen. (Compl. at ¶ 8.) On December 30, 2002, Plaintiff was issued his C.R.B.A., (id., Ex. 2), and Plaintiff's passport (U.S. passport No. 710164736) was issued January 7, 2003, (id., Ex. 1).

procedures and, if deemed mandatory, undercuts the President's sole constitutional authority in the area of foreign affairs.[17] It likewise casts aside 22 U.S.C. § 211a, which recognizes the Secretary of State's broad authority over U.S. passport issuance. This authority is discretionary, not mandatory or ministerial, because the Secretary is required to make judgments determining the eligibility of applicants for U.S. passports.[18] Agee, 453 U.S. at 293-94 (passport is political document by which bearer is recognized in foreign countries as U.S. citizen; issuance of passport is sole province and responsibility of Executive); see also Perkins v. Elg, 307 U.S. 325, 349-350 (1939).

Given the fact that the Executive Branch controls foreign policy in general and the recognition of specific countries and the issuance of individual passports in particular, see Agee, 453 U.S. at 300-301; Zemel v. Rusk, 381 U.S. 1, 7-8 n.5 (1965), and given the unconstitutional difficulties that any other understanding would entail, Section 214(d) can and should be construed to be permissive. Accordingly, mandamus should not issue, and the Complaint should be dismissed.

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[17] Moreover, even assuming Plaintiff prevailed on all of his legal theories, Section 214(d) still would not give Plaintiff the specific relief he requests to "order[] the defendant to issue a passport to the plaintiff specifying the plaintiff's place of birth as 'Jerusalem, Israel.'" (See Compl., "Prayer" at p. 4.) Section 214(d) only purports to require the Secretary to "record the place of birth as *Israel*." See the Act, Section 214(d).

[18] 8 U.S.C. § 1104(a)(3) charges the Secretary with making determinations of nationality of persons outside the U.S. Accompanying regulations are at 22 C.F.R. Part 50, and 22 C.F.R. § 50.2 provides that the State Department shall determine claims to U.S. nationality when made by persons abroad on the basis of an application for registration. (For a passport, see 22 C.F.R. § 50.4; For a C.R.B.A., see 22 C.F.R. §§ 50.4, 50.7 and 50.8.)

IV. CONCLUSION

For all of these reasons, the Court should dismiss Plaintiff's Complaint with prejudice. A proposed Order is attached.

Dated: December 22, 2003

Respectfully submitted,

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